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No. 85-1339

IN THE

Supreme Court of the United States

October Term, 1985

MIER COHEN and EREZ ATAVA,
Petitioners,

v.

STATE OF NEW MEXICO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

RESPONDENT'S BRIEF IN OPPOSITION

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, State of New Mexico, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the New Mexico Supreme Court entered on December 9, 1985 and made final by judgment entered on December 27, 1985.

STATEMENT OF THE CASE

A brief restatement of some of the facts is necessary to ensure that the facts relied upon by the Court in consideration of the petition are fair and accurate. Respondent agrees with Petitioners that only Officers Summers and Velarde testified at the hearing on the motion to suppress. Respondent also agrees that there is an error in the lower court's specification of the time at which the officers first observed the spare tire containing the cocaine.

Officer Summers has been a state police officer for eight and a half years. For the last six years, he has worked on Interstate 40 (I-40) out of the City of Albuquerque. In December, 1983, he attended a "refresher course" on narcotics smuggling in vehicles on I-40. (2/20/84, T. 2, 791-809). The officer's first cocaine seizure on I-40 was that involving Petitioners. The officer did not relate that he had no previous experience with drug cases.

On January 5, 1984 Officer Summers positioned his police vehicle on I-40 facing eastward to conduct a radar survey of westbound vehicles. The speed limit on the highway was 55 m.p.h. At approximately 5:07 p.m., Officer Summers' radar clocked Petitioners' vehicle traveling at 61 m.p.h. The officer engaged his vehicle's emergency lights to get Petitioners' attention. He waited for clearance of the westbound traffic before proceeding to enter the highway to stop Petitioners' vehicle. As he started to pull onto the highway, their vehicle passed him. Officer Summers noticed the vehicle had Florida license plates. He continued his pursuit of Petitioners' vehicle. (2/20/84, T. 2, 437-453; T. 3, 647-678).

Upon making the stop, the officer intended only to issue a speeding citation to the driver of Petitioners' vehicle. He related that intent to Petitioner Cohen. (2/20/84, T. 2, 658-665; T. 3, 578-581). His limited intent led him to refuse the assist-

ance of an Albuquerque police officer who stopped and offered assistance to him. It is a policy of law enforcement personnel to offer assistance to a lone officer on investigation. Officer Summers refused the assistance because he was not suspicious about the presence of drugs in Petitioners' vehicle. (2/20/84, T. 3, 827-835). His suspicions were later aroused by actions of Petitioner Cohen exhibited during the traffic violation stop. (2/20/84, T. 2, 763-817; T. 3, 578-581).

When told by Officer Summers that he was going to get a traffic citation for speeding, Petitioner said nothing in reply. (2/20/84, T. 2, 658-671). The officer also told both Petitioners to remain in their vehicle while he ran a National Crime Information Computer (NCIC) check on them and their vehicle.

The officer returned to his vehicle and contacted his radio dispatcher at 5:09 p.m. to have the NCIC check conducted. (2/20/84, T. 3, 422-448). During the subsequent five-minute period, Officer Summers observed that Petitioners leaned over and talked to each other and several times one or both turned around and looked at him. (2/20/84, T. 2, 680-690). At the end of this period, Cohen got out of his vehicle and walked toward the officer's vehicle. The officer immediately got out of his vehicle and met Cohen between the vehicles. Cohen wanted to know whether the officer was going to issue a traffic citation to him and whether it would go on his record. He was anxious and more nervous than the normal person to whom the officer gives a traffic citation for speeding. The officer had not and did not tell Cohen he was suspected of illegal drug transportation.[1] (2/20/84, T. 2, 583-671, 699-762). Officer Summers did tell Cohen that it was cold outside

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[1] In arguing the reasons why the writ should be granted, Petititoners imply that Cohen was nervous because the officer told him he was suspected of drug trafficking. (Petition 10). Significantly, in their statement of the case they make no mention of any fact to support this assertion.

and that he had not received the NCIC replies. He requested Cohen to return to his vehicle and to remain inside until the officer finished with the NCIC check and the writing of the traffic citation. Petitioner Cohen returned to his vehicle and the officer to his. (2/20/84, T. 2, 675-762). Ten to fifteen minutes had then elapsed from the time of the initial stop. (2/20/84, T. 2, 763-780).

Based on Cohen's actions and the things he had observed about the vehicle, i.e., Florida license plates and rental car contract, Officer Summers decided to pursue the investigation further. (2/20/84, T. 2, 763-774). The officer thought that it was unusual for Cohen to get out of his vehicle in "inclement weather". The temperature was about 25° and the weather was cold and windy. From h' s experience, Officer Summers knew that most people during a traffic violation stop in inclement weather do not get out of their vehicles. They prefer to have the officer walk out in the cold. (2/20/84, T. 2, 774-809). Officer Summers contacted his radio dispatcher for the assistance of narcotics officers from the state police office.

Officer Summers proceeded to wait for the NCIC replies and the narcotics officers. Before their arrival, Officer Summers received negative NCIC replies. The officer did not know the amount of time that elapsed between the receipt of the replies and the narcotics officers' arrival. Officer Velarde, with Officer Marino, went to Officer Summers' assistance. Officer Velarde testified that they took no more than ten minutes to get from the state police headquarters to Officer Summers' location. (2/20/84, T. 4, 314-321). The distance between the two areas was eight to ten miles.

The narcotics officers were initially briefed by Officer Summers on the investigation. Officer Velarde requested Petitioner Atava to leave his vehicle and accompany the officer to his vehicle. Officers Marino and Summers went to Petitioner

Cohen. Officer Marino asked Cohen whether he would mind if the officers searched the vehicle for narcotics. Cohen told Marino to go ahead and search. Officer Marino gave Cohen a consent-to-search form that Officer Summers had prepared during his wait for the narcotics officers. Cohen took two to three minutes to read the form. (2/20/84, T. 3, 017-082). He expressed no hesitation in signing the form. *Id.*

The officers decided for the safety of all – they had three vehicles parked on the highway, and it was cold and getting dark – to conduct the search at a service station about three miles away. The service station was warm and lighted. It took three to four minutes to reach the service station. (2/20/84, T. 3, 105-120; 143-145). Upon reaching the station, Officers Summers and Velarde first searched personal effects in the rear of the vehicle. Afterward they came upon a loose spare tire. This tire, based on the testimony of the two officers, was first observed at 5:40 p.m. or 5:45 p.m. (2/20/84, T. 3, 145-245; T. 4, 567-577). Five packages of cocaine were found in the tire.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioners request the Court to exercise its discretionary review of the opinion rendered by the New Mexico Supreme Court which they claim resolved the Fourth Amendment questions presented in the petition in direct conflict with controlling decisions of the Court and decisions of the federal appellate courts and the highest courts of other states. That request should be denied in light of the fact that the opinion presents no new question in the development of Fourth Amendment law, there is no conflict, and the result reached is correct.

A. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), Supports the Position that No Additional Justification Was Needed to Detain Petitioners Beyond the Probable Cause Needed to Stop Petitioners for a Traffic Violation.

Throughout the development of this case, the parties and the lower courts have proceeded on the premise that Officer Summers needed additional justification to detain Petitioners after he received the negative NCIC replies. That premise appears questionable in light of the Court's decision in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

This case essentially deals with the propriety of an officer's detaining a person to request a consent to search after making a lawful (because based on probable cause) traffic violation stop. In *Schneckloth* the Court implicitly considered the question. A police officer in that case stopped a vehicle at approximately 2:40 a.m. after observing that one of its headlights and its license plate light were burned out. Six men were in the vehicle. In reply to the officer's request for a driver's license, only passenger Acala produced one. Acala explained that the vehicle was his brother's. After the six men got out of the car at the officer's request and after two additional policemen had arrived, the initiating officer asked Acala if he could search the car. The period of the wait for the other officers was not specified. Acala answered, "Sure, go ahead." Prior to the search, no one had been threatened with arrest. All was very congenial at the time. Acala assisted in the search.

The question before the *Schneckloth* Court was the showing required of the state to demonstrate a voluntary consent to search by one not in custody. The Court was not concerned that the officers did not pursue or complete the investigation of the traffic violation, beyond requesting the occupants'

identification, prior to requesting consent to search.[2] The Court noted two competing concerns in determining the meaning of a voluntary consent: the legitimate need for consent searches and the equally important requirement of assuring the absence of coercion. *Schneckloth, supra* at 227. Consent searches are a valuable tool where the police have reason to stop a car for traffic violations, but lack probable cause to search the vehicle. *Id.* at 227-228. In assessing the value of the consent to search given in the case, the Court thought significant that it "yielded tangible evidence as a basis for prosecution and provided some assurance that others, wholly innocent of the crime, were not mistakenly brought to trial." *Id.*

At a minimum, *Schneckloth* recognizes the propriety of consent searches conducted after a valid traffic violation stop. It recognizes the propriety of consent searches in such situations even where the officers don't pursue the traffic violation investigation beyond asking for identification but instead request a consent to search. It would seem to allow a minimal detention beyond that necessary for a traffic violation stop where nothing occurs during and after the extended detention other than a request for a consent to search. Here Petitioners were detained less than an additional ten minutes beyond that necessary for the completion of the traffic violation investigation.[3] Petitioners were not harassed, threatened, or

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[2] Noted in the lower court's opinion, but not this Court's opinion, was the fact that at some point, apparently after the search was conducted, the driver was given two traffic citations. *People v. Bustamonte*, 270 Cal. App. 2d 648, 76 Cal. Rptr. 17, 19 (1969).

[3] The best assessment of the amount of time Petitioners were detained after the NCIC replies were received comes from the testimony of Officer Velarde. He testified that he and Officer Marino took no more than ten minutes to arrive at Officer Summers' location after the latter requested assistance. Officer Summers received the NCIC replies sometime between the request and the arrival of the narcotics officers.

intimidated during the additional period. Rather, they sat alone in their vehicle.

The Court's decisions on illegal detentions and evidence as the fruit thereof are factually distinguishable and do not require the inapplication of *Schneckloth*. In none of those decisions did the officers initially have probable cause to detain the suspects. *Florida v. Royer*, 460 U.S. 491 (1983); *Dunaway v. New York*, 442 U.S. 200 (1979); *Brown v. Illinois*, 422 U.S. 590 (1975); *Wong Sun v. United States*, 371 U.S. 471 (1963). The officers' first encounter with the suspects was either illegal at its inception or its permissible bounds were exceeded by involuntary transport of the suspect to another location. Such was not the situation here; the initial encounter was justified by probable cause to detain for a traffic violation and there was no involuntary transport to another location.

In light of the reasoning of *Schneckloth* on the propriety of consent searches after a lawful traffic violation stop, the extended detention, which was only minimally extended in time and involved no threats, harassment, or intimidation, was sufficiently legitimized by the probable cause which justified the initial detention of Petitioners.[4]

B. There Is No Conflict Between this Case and *Reid v. Georgia*, 448 U.S. 438 (1980), on the Issue of Whether Sole Reliance on a Drug Courier Profile Can Establish Reasonable Suspicion of Criminal Activity. Reasonable Suspicion of Petitioners' Transportation of Illegal Drugs Was Based on the Particular Actions of Petitioner Cohen Coupled with Petitioners' Match to a Drug Courier Profile Which Profile Was Given Meaning by Cohen's Actions.

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[4] Respondent does not intend to intimate that the Fourth Amendment under no circumstances would require additional justification to further detain a person after the completion of matters related to a traffic violation stop. A lawful custody does not make the detainee fair game for any investigative technique the officer may wish to employ.

Petitioners contend the New Mexico Supreme Court's opinion conflicts with *Reid v. Georgia*, 448 U.S. 438 (1980), and other controlling decisions of this Court in determining that their detention, based solely on a few factors of a "drug courier profile", was based on reasonable suspicion of transportation of illegal drugs by them. The facts of the case and the Court's decisions demonstrate that the conflict does not exist.

Petitioners do at least three inappropriate things in order to create a conflict between *Reid* and this case. They seem to suggest that *Reid* eliminated the use of the drug courier profile as a factor in establishing reasonable suspicion. They ignore the Court's decisions instructing that reasonable suspicion is to be determined in light of the totality of the circumstances and not by assessment of each factor of the circumstances in isolation. Most important, they generally ignore the actions of Cohen which created a particularized and objective suspicion of criminal activity by Petitioners. This is not a case of sole reliance on a drug courier profile to establish reasonable suspicion.

The Court's decisions have set forth the basic principles to be applied in assessing whether reasonable suspicion exists. Specifically, reasonable suspicion of criminal activity is to be assessed in light of the totality of the circumstances. E.g., *United States v. Cortez*, 449 U.S. 411, 417-418 (1981); *Brown v. Texas*, 443 U.S. 47 (1979). The totality of the circumstances must demonstrate that the investigating officer had a particularized and objective basis for suspecting the person of criminal activity. *Cortez, supra.* The "modes or patterns of operation of certain kinds of lawbreakers" are permissible factors in the analysis of the existence of reasonable suspicion. *Id.* at 418. Due recognition must be given to the fact that a trained, experienced officer may be able to perceive and articulate meaning in given conduct which would be wholly innocent to an untrained observer. *Brown v. Texas,*

supra at 52 n.2. The determination of reasonable suspicion does not demand hard certainties of criminal activity; probabilities of such activity are enough. *Cortez, supra* at 418.

With these basic principles apparently in mind, the *Reid* Court determined as a matter of law that a suspect's match to a drug courier profile and his and his companion's manner of walk did not establish reasonable suspicion. The concern of the Court was that neither alone nor in conjunction did the profile and the manner of walking create a particularized and objective suspicion of criminal activity. That is a legitimate concern in order to foreclose the wholesale stopping of wholly innocent persons. Although the Court decided that reasonable suspicion was not established by the profile and the suspect's conduct, it did not hold that a drug courier profile may never be utilized to establish reasonable suspicion.

Members of the Court who agreed that reasonable suspicion was not shown in *Reid*, have before and since that decision, expressed the propriety of the use of a drug courier profile in establishing reasonable suspicion. Thus, in the opinion of Justice Powell, joined by two other members of the Court, in *United States v. Mendenhall*, 446 U.S. 544, 560 (1980), it was determined that the suspect's match to a drug courier profile constituted reasonable suspicion of criminal activity by her. In reaching this conclusion, Justice Powell pointed out the public's compelling interest in the detection of those trafficking in deadly drugs for personal profit. *Mendenhall, supra* at 561. The drug courier profiles were developed to meet this "pressing concern". *Id.* at 562. Appropriately, therefore, the "agent's knowledge of the methods used in recent criminal activity and the characteristics of persons engaged in such illegal practices" can give rise to reasonable suspicion. *Id.* at 563. In *Mendenhall* the agents' knowledge of a drug courier profile and their observations of Mendenhall's match to the profile established reasonable suspicion of criminal activity. The profile contained factors which Petitioners argue cannot

establish reasonable suspicion, i.e., arrival from a source city, nervousness, and little luggage. (Petition 7-8, 9-10).

In *Florida v. Royer*, 460 U.S. 491 (1983), eight members of the Court agreed that a suspect's match to a drug courier profile coupled with the fact of his traveling under an assumed named constituted reasonable suspicion of his possession of illegal drugs. *Royer, supra* at 493 n.2, 502, 515-516, 523-524. Again, the profile included factors similar to those Petitioners argue may not be used to establish reasonable suspicion, i.e., payment in cash for a one-way ticket to a city known as a major distribution center for illegal drugs, and nervousness. *Id.* at 502, 523-524. "Any one of these factors relied upon by the Miami police may have been as consistent with innocence as with guilt; but the combination of several of these factors is the essence of both 'articulable suspicion' and 'probable cause'". *Id.* at 525.

It is clear that a majority of the Court recognizes the propriety of using factors on a drug profile to establish reasonable suspicion of criminal activity and that the combination of several of the factors in a given situation can amount to the requisite particularized and objective suspicion required to establish reasonable suspicion. The New Mexico Supreme Court did no more. (Petition App. 25-26).

Reasonable suspicion of illegal drug transportation by Petitioners, however, was neither established solely or initially on the basis of their match with a drug courier profile. The triggering factor was Petitioner Cohen's actions in getting out of his car in inclement weather when most persons stopped for a traffic violation under those circumstances would have remained in their car. He got out to engage in pointless conversation with the officer; there was no need to ask the officer whether he was going to receive a traffic citation, for the officer had already told him during the initial encounter that one would be given. From the initial encounter, Petitioners

also knew that the officer was conducting a NCIC check on them and their vehicle. Cohen said nothing during the initial encounter to indicate any concern. However, during the second encounter, he was anxious and more nervous than the average person stopped for a traffic violation. His then particular conduct gave rise to a particularized and objective suspicion of criminal activity by Petitioners which set them apart from the very large number of innocent persons traveling from Florida in rental cars and with little luggage. Compliance with, and not contravention of, the Court's decisions, including *Reid*, on the establishment of reasonable suspicion is shown by this case.

There is no conflict between this case and the decisions of the federal appellate courts. *United States v. Berry*, 670 F.2d 583 (5th Cir. 1982), is representative of some of the federal courts in setting forth their position on the use of a drug courier profile in establishing reasonable suspicion of criminal activity. *See e.g., United States v. Berryman*, 717 F.2d 650 (1st Cir. 1983). The thrust of that position is that a profile may not be used in a mechanistic fashion, checking off a list of characteristics with no consideration of the particular circumstances at issue, to establish reasonable suspicion. A characteristic of a suspect which also appears on a profile may, however, be used to establish reasonable suspicion where the officer, in light of his experience, can demonstrate that the factor in the particular circumstances at issue is supportive of that suspicion. Officer Summers was able to do that in his case. He did not apply the drug courier profile in a mechanistic fashion. Although at the initial encounter with Petitioners he was aware that they matched characteristics on the profile for drug smuggling on I-40, he intended to detain them only for the processing of a traffic citation. Only after Cohen exhibited particular actions, unusual for the average person stopped for a traffic violation, did the officer intend to detain

them for the additional purpose of investigation of drug transportation. In short, the officer explained with reference to his experience in giving traffic citations and training on illegal drug transportation why Cohen's particular conduct was suspicious and gave meaning to the factors on the profile in the particular circumstances.

Likewise the arousal of reasonable suspicion in the officer, pursuant to Cohen's particular suspicious conduct and Petitioners' match with a drug courier profile, distinguishes this case from state courts' decisions which hold that a drug courier profile alone does not create reasonable suspicion. *See e.g., Jacobson v. State,* 476 So.2d 1282 (Fla. 1985).

The conflict claimed by Petitioners to exist between this case and the controlling decisions of this Court does not exist. Officer Summers' intrusion on Petitioners' Fourth Amendment interest, when balanced against its promotion of legitimate governmental interests, was reasonable and therefore proper. *See United States v. Sharpe,* 105 S.Ct. 1568 (1985); *Royer, supra; Mendenhall, supra* at 561-566. The petition should be denied for these reasons.

C. The New Mexico Supreme Court Did Not Decide That a Voluntary Consent to Search Obtained During an Unlawful Detention Made it Unnecessary to Determine Whether the Consent Was a Fruit of the Unlawful Detention. There Is No Conflict Between this Case and *Florida v. Royer,* 460 U.S. 491 (1983).

In a clear mischaracterization of the New Mexico Supreme Court's analysis, Petitioners argue the lower court determined that a voluntary consent to search obtained during an unlawful detention made it unnecessary to determine whether the

consent was the fruit of the unlawful detention. By the time the lower court considered the validity of the consent, it had already determined that the detention was legal. The legality of the detention was central to the court's determination that *United States v. Recalde*, 761 F.2d 1448 (10th Cir. 1985) was distinguishable. The court stated

> [t]he court in *Recalde* found the consent tainted by the illegal detention. That is not the case here. We have determined that the detention was legal.

(Petition App. 19). The portion of the court's opinion relied upon by Petitioners to demonstrate the existence of a conflict between this case and *Royer* follows the above-quoted portion of the opinion. Reading the opinion in context, it is evident that the alleged conflict is manufactured.

CONCLUSION

Respondent, State of New Mexico, respectfully requests the Court to deny the writ of certiorari. Exercise of the Court's discretion in favor of the questions presented by the petition is unwarranted where the claimed conflicts between this case and the controlling decisions of the Court do not exist, the case's result is correct, and the case presents no new question in the development of Fourth Amendment law.

Respectfully submitted,

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